Supreme Court, U.S.
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No. 02-1809

In The Supreme Court of the United States

J. ELLIOTT HIBBS, IN HIS OFFICIAL CAPACITY AS DIRECTOR OF THE ARIZONA DEPARTMENT OF REVENUE,

Petitioner,

v.

KATHLEEN M. WINN, AN ARIZONA TAXPAYER; DIANE WOLFTHAL, ARIZONA TAXPAYER; MAURICE WOLFTHAL, ARIZONA TAXPAYER; LYNN HOFFMAN, AN ARIZONA TAXPAYER,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

JOINT APPENDIX

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The following opinions and order have been omitted in printing this joint appendix because they appear on the following pages in the appendix to the printed Petition for Certiorari:

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[1] Some minor typographical errors have been corrected in the documents contained in this Joint Appendix. These changes, however, do not affect the substance of any of the documents.

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Order of the United States Court of Appeals for the Ninth Circuit denying petition for rehearing en banc, entered on March 5, 2003 ..... App. 1

The following orders have been omitted in printing this joint appendix because they appear on the following pages in the appendix to the printed Respondents' Brief in Opposition:

Order of the United States Court of Appeals for the Ninth Circuit recalling mandate issued on October 25, 2002 ..... App. 1

Order of the United States Court of Appeals for the Ninth Circuit directing parties to file simultaneous briefs setting forth their respective positions on whether this case should be reheard en banc, dated November 13, 2002 ..... App. 2

The following letter has been omitted in printing this joint appendix because it appears in the appendix to the printed Petitioner's Reply Brief:

Letter to Paula S. Bickett from Cathy A. Catterson, Court Executive/Clerk of Court, United States Court of Appeals for the Ninth Circuit dated February 7, 2003 ..... App. 1

General Docket
US Court of Appeals for the Ninth Circuit

6/14/01	Filed certificate of record on appeal. RT filed in DC none. [01-15901] (jr)
6/18/01	Filed original and 15 copies aplts' opening brf (Informal: no) of 41 pages and five excerpts of record in 1 volume; served on 6/15/01. [01-15901] (jr)
6/18/01	Rec'd aplt's ntc of lodging documents with the court; served on 6/15/01 to (MOATT). [01-15901] (jr)
7/23/01	Filed original and 15 copies aple's 27 page brf; served on 7/18/01. [01-15901] (jr)
8/3/01	Filed original and 15 copies aplts' rpy brf (Informal: no) of 14 pages; served on 8/1/01. [01-15901] (jr)
4/23/02	FILED CERTIFIED RECORD ON APPEAL IN: 1 Clerks File (from DC transmittal) [01-15901] (jas)
6/11/02	ARGUED AND SUBMITTED TO Mary M. SCHROEDER, Dorothy W. NELSON, Stephen R. REINHARDT [01-15901] (gb)
10/3/02	FILED OPINION: REVERSED and REMANDED. (Terminated on the Merits after Oral Hearing; Reversed; Written, Signed, Published. Mary M. SCHROEDER; Dorothy W. NELSON; Stephen R. REINHARDT, author) FILED AND ENTERED JUDGMENT. [01-15901] (jr)
10/25/02	MANDATE ISSUED. Costs taxed against defendant in the amount of $383.80. [01-15901] (jr)

10/28/02 Filed order (Deputy Clerk: pa) the mdt issued on 10/25/02 in the above captioned appeal was in error and is RECALLED. [01-15901] (jr)

11/13/02 Filed order (Mary M. SCHROEDER, Dorothy W. NELSON & Stephen R. REINHARDT) the parties are directed to file simultaneous brfs setting forth their respective positions on whether this case should be reheard en banc. The brfs shall not exceed 15 pages and shall be filed within 21 days from the filed date of this order. Fifty copies should be filed. [01-15901] (jr)

11/27/02 Filed aple's motion for extension of time to file simultaneous brf, etc. [4578447-1] [01-15901]; served on 11/26/02 (FAXED TO PANEL). [4590680] (jr)

11/29/02 Filed order (Mary M. SCHROEDER, Dorothy W. NELSON, Stephen R. REINHARDT,): The aple's motion for an ext of time to file simultaneous briefs whether this case should be heard en banc is GRANTED. Both parties are directed to file their briefs on or before 12/31/02. (PHONED OUT 3:40) [01-15901] (hh)

12/30/02 Rec'd original and 50 copies aple's suppl brf of 15 pages; served on 12/27/02. Deficient; covers entitled "Petition for Rehearing and Rehearing En Banc. Notified counsel to submit corrected covers entitled "Suppl Brf". [01-15901] (jr)

12/30/02 Filed original and 50 copies aplts' suppl brf of 11 pages in response to order [4578447-1]; served on 12/27/02 to (PANEL & ALL ACTIVE JUDGES). [01-15901] (jr)

12/31/02 Rec'd 51 corrected covers from aple for suppl brf. [01-15901] (jr)

12/31/02 Filed original & 50 copies aple's suppl brf in response to order [4578447-1]; served on 12/27/02 to (PANEL & ALL ACTIVE JUDGES). [01-15901] (jr)

1/21/03 Rec'd (LATE) aple's motion for clarification of order recalling mdt [01-15901]; served on 1/17/03 to (SR). [4637070] (jr)

2/7/03 At direction of panel, clk's ltr dated 2/7/03 sent to aplt re: recalling mdt suspends the finality of judgment. [01-15901] (jr)

3/5/03 Filed order FOR PUBLICATION (Mary M. SCHROEDER, Dorothy W. NELSON, Stephen R. REINHARDT,): . . . The request for rehearing en banc is DENIED. KLEINFELD, Circuit Judge, with whom Circuit Judge O'SCANNLAIN joins, dissenting from denial of rehearing en banc. [01-15901] (hh)

3/17/03 MANDATE ISSUED. Costs taxed against defendant in the amount of $383.80. [01-15901] (jr)

6/23/03 Rec'd ntc from Supreme Court; petition for certiorari filed. Supreme Court No. 02-1809, filed on 6/3/03 & placed on dkt 6/16/03. [01-15901] (jr)

U.S. District Court
District of Arizona

2/15/00	1	COMPLAINT FILED (lsb) [Entry date 02/22/00]
2/23/00	2	RETURN OF SERVICE EXECUTED personally upon dft Mark W Killian (summons/complaint) on 2/18/00, by svc upon Sherry Scipione, Secretary, authorized to accept. (sd) [Entry date 02/25/00]
3/9/00	3	MOTION to dismiss for lack of subject matter jurisdiction by dft Mark W. Killian [3-1] (sd) [Entry date 03/10/00]
4/11/00	14	RESPONSE by plas to motion to dismiss for lack of subject matter jurisdiction by dft Mark W. Killian [3-1] (sd) [Entry date 04/12/00]
4/20/00	22	REPLY by dft Mark W. Killian to response to motion to dismiss case for failure to state a claim by intervenor Lisa Graham Keegan [6-1] (sd) [Entry date 04/24/00]
2/27/01	36	ORDER by Judge Earl H. Carroll granting motion to dismiss for lack of subject matter jurisdiction by dft Mark W Killian [3-1]. All other pending mtns are denied as moot. terminating case (cc: all counsel) (sd) [Entry date 02/27/01]

2/27/01	37	JUDGMENT: The Crt has granted dft's mtn to dismiss for lack of subj matter jurisdiction; therefore, plas take nothing and their complaint and action are hereby dismissed. (cc: all counsel) (sd) [Entry date 02/27/01]
3/27/01	38	NOTICE OF APPEAL by all plas from District Court judgment [37-1], and order [36-2] (cc: 2CCA/All Counsel/EHC) (rew) [Entry date 05/02/01] [Edit date 11/08/02]
3/27/01	39	Notice of Transcript Designation; no transcripts to be ordered (rew) [Entry date 05/02/01]
5/2/01	–	REMARK; CADS forwarded to Ninth Circuit this date (rew) [Entry date 05/02/01]
5/2/01	–	Certificate of Record Transmitted to 9CCA [38-1] (rew) [Entry date 05/02/01]
11/7/02	41	CERTIFIED COPY of the 9th Circuit Mandate reversing and remanding the decision of the District Court; we reverse the district court's grant of AZ's motion to dismiss and remand the case for further proceedings, re: 01-15901 [Appeal [38-1]] Case reopened [41-1] [41-1] (cc: all counsel/judge) (rew) [Entry date 11/07/02]
11/8/02	42	Certified Copy of 9th Circuit Order; the mandate issued 10/25/02 was in error and is recalled, re: appeal [38-1] (cc: all cnsl/judge) (case re-closed) (rew) [Entry date 11/08/02]

3/10/03	–	Original Record Returned from 9th Circuit re [38-1] 1 volume original file; (rew) [Entry date 03/10/03]
3/27/03	43	CERTIFIED COPY of 9th Circuit Mandate reversing and remanding the decision of the District Court; we reverse the district court's grant of AZ's motion to dismiss and remand the case for further proceedings, re: 01-15901 [38-1] Case reopened [43-1] (43-1] (cc: all counsel/judge) (rew) [Entry date 03/27/03]

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UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

KATHLEEN M. WINN, an Arizona taxpayer; DIANE and MAURICE WOLFTHAL, Arizona taxpayers; and LYNN HOFFMAN, an Arizona taxpayer, Plaintiffs, v. MARK W. KILLIAN, in his official capacity as Director of the Arizona Department of Revenue, Defendant.	No. CIV '00 0287 PHX EHC **COMPLAINT**

Plaintiffs, by and through their counsel undersigned, hereby make the following complaint against Defendant:

Parties

1. Plaintiffs, Kathleen M. Winn, Diane and Maurice Wolfthal, and Lynn Hoffman, are citizens and residents

of Arizona, who pay Arizona income taxes on income earned in Arizona.

2. Defendant Mark W. Killian is Director of the Arizona Department of Revenue. Defendant Killian is responsible under state law for the administration of Arizona's income tax laws, including A.R.S. § 43-1089, the constitutionality of which is challenged in this action.

Jurisdiction

3. Plaintiffs allege that A.R.S. § 43-1089, on its face and as administered by Defendant Killian, deprives them of rights guaranteed by the First and Fourteenth Amendments to the United States Constitution. Plaintiffs seek relief pursuant to the United States Constitution and 42 U.S.C. § 1983. This court has jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1343(a), and venue pursuant to 28 U.S.C. § 1391(b).

Factual Allegations

4. Plaintiffs challenge the constitutionality, on its face and as applied, of A.R.S. § 43-1089, enacted in 1997. A copy of A.R.S. § 43-1089 is attached to this complaint as Exhibit A.

5. A.R.S. § 43-1089 provides for a "tuition tax credit," such that any taxpayer who pays Arizona income taxes may satisfy up to $500 of his, her, or its annual state income tax obligation by paying that amount to a "school tuition organization" ("STO") instead of to the State.

6. Pursuant to A.R.S. § 43-1089, an STO must, in turn, use at least 90% of the payments it receives from

taxpayers for tuition grants to children to attend private primary or secondary schools in Arizona.

7. Taxpayers who make payments to any STO in a given tax year receive a 100%, dollar-for-dollar credit on the state income taxes that are due from them for that year, i.e., they may reduce the income tax paid to the State for that year by the entire amount, up to $500 per year, paid to an STO.

8. Taxpayers are not required to have children in school or to have incurred any educational expenses (or any other expenses) in order to claim the 100% tax credit for payments made to STOs.

9. The amounts paid to STOs by taxpayers and claimed by taxpayers as credits toward payment of Arizona income taxes are not contributions of taxpayer funds to the STOs, because taxpayers incur no cost in making such payments. The amounts are, instead, contributions of state funds to the STOs, because the amounts paid to STOs reduce state income tax revenues on a dollar-for-dollar basis.

10. A.R.S. § 43-1089 places no limit on the total amount of State funds that may be diverted to STOs each year. If one million Arizona taxpayers utilized the STO credit each year, the amount of State income tax revenues annually diverted to STOs would be $500 million.

11. STOs must make tuition grants of State funds available to students at more than one non-public school. As long as they do so, STOs may (and most do) restrict their grants to students attending religious schools. An STO may, for example, make tuition grants of State funds available only to children attending Catholic schools, only to children attending Lutheran schools, only to children attending Christian schools or only to children attending Jewish

schools. STOs may also restrict their grants of State funds only to children of a specific religious denomination, for example, Catholic children, Lutheran children, Christian children or Jewish children.

12. STOs that restrict their grants to students attending religious schools use state funds solely for the purpose of enabling children to attend religious schools at State expense.

13. A.R.S. § 43-1089 thus authorizes the formation of agencies that have as their sole purpose the distribution of State funds to children of a particular religious denomination or to children attending schools of a particular religious denomination.

14. The money used by STOs for grants to students attending religious schools would otherwise have been paid into the state general fund by the taxpayers making those donations. The diversion of those funds to such STOs therefore reduces the balance of the state general fund on a dollar-for-dollar basis.

15. As of the end of August, 1999, 15 STOs had reported data to the Arizona Department of Revenue regarding funds received and/or tuition grants awarded during calendar year 1998. Of the total of $1,815,799 received from taxpayers by all STOs in 1998, at least $1,708,769, or 94%, went to STOs restricting tuition grants of state funds to students attending religious schools.

16. The largest STO recipient of income tax revenues during the 1998 calendar year was The Catholic Tuition Organization of the Diocese of Phoenix, which received $837,140. The Catholic Tuition Organization restricts its grants to students attending Catholic schools in the Diocese of Phoenix. Eligible schools include, for example, Saint Mary's High School. The advertised mission of Saint Mary's is "to provide a

quality Catholic education by developing and sustaining a rich tradition grounded in Gospel and family values . . ." Another eligible school is St. Louis the King School, which advertises that "Gospel values and self-discipline skills are infused into the total curriculum." Another eligible school, St. John Vianney School, advertises that Christ "is the unseen but ever present teacher in its classes."

17. The second largest STO recipient of income tax revenues was Arizona Christian School Tuition Organization, which received $538,611. The Arizona Christian School Tuition Organization restricts its grants to students attending "evangelical" Christian schools in Arizona.

18. The third largest STO recipient of income tax revenues was Brophy Community Foundation, which restricted grants to children attending two Catholic schools (Brophy College Preparatory for boys and Xavier College Preparatory for girls) and which received $163,603. The advertised philosophy of Xavier College Preparatory includes such goals as "instill[ing] a knowledge of the truths of faith, enlightened by the post-Conciliar teachings of the Church." Brophy College Preparatory's advertised mission includes the goal of offering students "an intimate relationship with God" through "the process of nurturing the soul."

19. The three religious STOs described above, which controlled 85% of the total STO donations during 1998, made no scholarship grants at all during that year. Despite the unavailability of that significant pool of funds, 75% of the scholarship funds granted by STOs in 1998 were granted to students attending religious schools, and 79% of the schools receiving scholarships were religious schools.

20. During 1998, the STO making the largest amount of tuition grants was Christian Scholarship of Arizona; the STO making the second largest amount of grants was Northern Arizona Christian School Scholarship; the STO making the third largest amount of grants was Higher Education Lutherans Program.

21. The school receiving the largest amount of STO funded tuition payments during 1998 was the Casas Adobes Baptist School in Tucson; the school receiving the second largest amount was the Palo Verde Christian School in Tucson; the schools receiving the third and fourth largest amounts were the Son Rise Christian School and the Sedona Christian School. Each of these schools is pervasively sectarian.

22. Upon information and belief, STOs received and granted a much larger amount of income tax revenue for calendar year 1999, due in part to the absence of any constitutional attack on the program for most of the year and to the public's greater familiarity with the program. Upon information and belief, the Catholic Diocese of Phoenix collected more than $4.5 million for its STO during 1999. The Catholic Diocese of Tucson recently announced that it had collected more than $850,000 for its STO during the same time period, and the Brophy Community Foundation announced that its 1999 donations exceeded $640,000.

23. Except for a statutory prohibition on making grants to children attending schools that discriminate on the basis of race, color, handicap, familial status or national origin, STOs may utilize any standards they wish for making tuition grants of State funds to students attending non-public schools, including preferences for students of a particular religious denomination. STOs need not make grants on the basis of financial need or academic performance. STOs may

also make grants to students attending schools that discriminate on the basis of religion and/or sex in accepting students.

24. Religious schools that receive tuition payments made with STO-granted State funds may and do use those payments to support religious instruction and worship. Those schools and the STOs that support them encourage taxpayers to take advantage of the tax credit program in order to further religious education.

25. A.R.S. § 43-1089 does not require or insure that tuition grants of State funds will be available to parents choosing to send their children to non-religious, non-public schools.

26. Because a very large majority (at least 94% in 1998) of STO funds are controlled by religion-specific STOs, parents choosing to send their children to non-religious, non-public schools may be unable to locate an STO willing and able to make a tuition grant to a student attending the non-religious school of the parents' choice. The tax credit scheme is, therefore, not religion-neutral in its operation.

27. Although A.R.S. § 43-1089(D) prohibits a taxpayer from designating his or her donation for the benefit of any dependent of the taxpayer, the statute does not prohibit two taxpayers from each designating his or her donation for the benefit of the other taxpayer's child, or a taxpayer from designating his or her donation for the benefit of a non-dependent relative (for example, a grandchild).

28. The statute also does not prohibit, for example, two or more religious schools from setting up an STO (like the Brophy Community Foundation, which serves two Catholic schools) and inviting parents to participate in a "contribution exchange," by which

each of their children would receive a $500 scholarship paid for by another participating parent. All parents would then be fully reimbursed for their contributions by the State of Arizona.

Allegations of Law

29. By affirmatively authorizing and permitting STOs to use State income-tax revenues to pay tuition for students at religious schools, A.R.S. § 43-1089, on its face and as applied, violates the First and Fourteenth Amendments to the United States Constitution.

30. By affirmatively authorizing and permitting STOs to use State income-tax revenues to make tuition grants to students attending only religious schools or schools of only one religious denomination or to students of only one religion, A.R.S. § 43-1089, on its face and as applied, violates the First and Fourteenth Amendments to the United States Constitution.

31. By affirmatively authorizing and permitting STOs to use State income-tax revenues to pay tuition for students at schools that discriminate on the basis of religion in selecting students, § 43-1089, on its face and as applied, violates the First and Fourteenth Amendments to the United States Constitution.

32. As a direct consequence of Defendant Killian's violation of Plaintiffs' constitutional rights, Plaintiffs and other Arizona taxpayers have been and will continue to be irreparably harmed by the diminution of the state general fund through the tax credit program described above.

33. Prior litigation was filed in the Arizona Supreme Court challenging the constitutionality of A.R.S. § 43-1089

(*Kotterman v. Killian*, 972 P.2d 606, *cert. denied*, __ S. Ct. __ (1999)). Plaintiffs' Complaint is not barred by res judicata because, among other things, neither Plaintiffs nor the Arizona Civil Liberties Union were parties to or controlled or directed the prior state court litigation, and no challenge was made in that litigation based on the actual practical effect of the statutory scheme, as the lawsuit was filed prior to the effective date of the statute.

Relief

Wherefore plaintiffs respectfully request:

A. Preliminary and permanent injunctive relief prohibiting defendant from allowing taxpayers to utilize the tax credit authorized by A.R.S. § 43-1089 for payments made to STOs that make tuition grants to children attending religious schools, to children attending schools of only one religious denomination, or to children selected on the basis of their religion;

B. A declaration that A.R.S. § 43-1089, on its face and as applied, violates the First and Fourteenth Amendments to the United States Constitution by affirmatively authorizing STOs to use State income-tax revenues to pay tuition for students attending religious schools or schools that discriminate on the basis of religion; and

C. An order that Defendant Killian inform all STOs that make tuition grants to children attending religious schools, to children attending schools of only one religious denomination, or to children selected on the basis of their religion, that all funds in their possession as of the date of this Court's order must be paid into the state general fund.

D. An award of attorneys' fees, expert fees, if any, and other costs, pursuant to 42 U.S.C. § 1988(b) and (c), the private attorney general doctrine, and any other applicable authority or rule of equity.

E. All other relief that this Court deems just and appropriate in the circumstances.

DATED this 15th day of February, 2000.

s/Marvin S. Cohen
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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

KATHLEEN M. WINN, an Arizona taxpayer; DIANE and MAURICE WOLFTHAL, Arizona taxpayers; and LYNN HOFFMAN, an Arizona taxpayer, Plaintiffs, vs. MARK W. KILLIAN, in his official capacity as Director of the Arizona Department of Revenue, Defendant.	No. CIV 00-0287-PHX-EHC MOTION TO DISMISS

Defendant Mark W. Killian, Director of the Arizona Department of Revenue ("Department"), moves pursuant to Fed. R. Civ. P. 12(b)(1) for an Order dismissing the Complaint filed by Plaintiffs because the Tax Injunction Act and the Eleventh Amendment deprive the Court of subject matter jurisdiction over the action.

This Motion to Dismiss is supported by the attached memorandum.

RESPECTFULLY SUBMITTED this 9th day of March, 2000.

JANET NAPOLITANO
Arizona Attorney General

PATRICK IRVINE
Assistant Attorney General

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION.

Plaintiffs challenge the constitutionality of a State tax credit for contributions to School Tuition Organizations. A.R.S. § 43-1089. An identical challenge has been rejected by the Arizona Supreme Court. *Kotterman v. Killian*, 193 Ariz. 273, 972 P.2d 606 (1999). The United States Supreme Court denied two petitions for writs of certiorari seeking review of the Arizona decision. *Rhodes v. Killian*, 120 S.Ct. 42 (1999); *Kotterman v. Killian*, 120 S.Ct. 283 (1999).[1]

Plaintiffs now seek to obtain in this Court the relief the petitioners in *Kotterman* could not obtain from the Arizona Supreme Court or the United States Supreme

[1] Plaintiffs state that neither they nor the Arizona Civil Liberties Union were parties to or controlled or directed the prior state court litigation. Complaint ¶ 33. The Arizona Civil Liberties Union did, however, file an amicus curiae brief in the Arizona Supreme Court. The Arizona Civil Liberties Union also provided counsel to Louis Rhodes, a petitioner in *Kotterman*, in preparing his petition for writ of certiorari to the United States Supreme Court.

Court. This Court, however, lacks jurisdiction to hear the issue. Both the United States Constitution and a federal statute bar federal court jurisdiction over this issue. Therefore, the Complaint should be dismissed.

II. THE TAX INJUNCTION ACT BARS FEDERAL COURTS FROM HEARING CHALLENGES TO STATE TAX LAWS.

The Plaintiffs' suit in District Court is barred by the Tax Injunction Act, 28 U.S.C. § 1341, which provides:

> The District Courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under state law where a plain, speedy and efficient remedy may be had in the courts of such state."

The Tax Injunction Act requires taxpayers to seek redress of issues related to state tax liability in state, rather than federal, court. This principle applies with equal force to actions brought under 42 U.S.C. § 1983, as well as to actions seeking declaratory and injunctive relief. *National Private Truck Council, Inc. v. Oklahoma Tax Comm'n*, 515 U.S. 582, 590 (1995) (concluding that "Congress did not authorize injunctive or declaratory relief under § 1983 in state tax cases when there is an adequate remedy at law."); *see also Fair Assessment in Real Estate Ass'n, Inc. v. McNary*, 454 U.S. 100, 116 (1981) (holding that taxpayers are barred by the principle of comity from asserting § 1983 damages actions in federal courts based on the administration of state tax systems); *California v. Grace Brethren Church*, 457 U.S. 393, 408 (1982) (28 U.S.C. § 1341 applies to declaratory as well as injunctive relief).

As the Supreme Court explained in *National Private Truck Council*:

> We have long recognized that principles of federalism and comity generally counsel that courts should adopt a hands-off approach with respect to state tax administration. Immediately prior to the enactment of § 1983, the Court articulated the reasons behind the reluctance to interfere:
>
> > "It is upon taxation that the several States chiefly rely to obtain the means to carry on their respective governments, and it is of the utmost importance to all of them that the modes adopted to enforce the taxes levied should be interfered with as little as possible." *Dows v. Chicago*, 11 Wall. 108, 110, 20 L.Ed. 65 (1871).
>
> Since the passage of § 1983, Congress and this Court repeatedly have shown an aversion to federal interference with state tax administration. The passage of the Tax Injunction Act in 1937 is one manifestation of this aversion. See 28 U.S.C. § 1341 (prohibiting federal courts from enjoining the collection of any state tax "where a plain, speedy and efficient remedy may be had in the courts of the State"). We subsequently relied upon the Act's spirit to extend the prohibition from injunctions to declaratory judgments regarding the constitutionality of state taxes. See *Great Lakes Dredge & Dock Co. v. Huffman*, 319 U.S. 293, 63 S.Ct. 1070, 87 L.Ed. 1407 (1943). Later, we held that the Tax Injunction Act itself precluded district courts from awarding such declaratory judgments.

512 U.S. at 586, 115 S.Ct. at 2354.

It cannot be disputed that Arizona provides a plain, speedy and efficient remedy in this case. The Arizona courts are open to Plaintiffs, just as they were to the petitioners in *Kotterman*.

Plaintiffs ask this Court to significantly interfere with the administration of Arizona's income tax by enjoining the allowance of a tax credit that is an integral part of the calculation of tax due. The Court would be ordering the State to tax some taxpayers more by denying them a tax credit authorized by State law. The interference with State tax administration would be no less than an order that some taxpayers be taxed less. In either case, this Court would be determining how much the State must assess certain taxpayers. Federal court jurisdiction over such a determination is plainly barred by both the language and spirit of the Tax Injunction Act.

III. THE ELEVENTH AMENDMENT DEPRIVES FEDERAL COURTS OF JURISDICTION TO HEAR THIS CASE.

The Eleventh Amendment, by its terms, deprives federal courts of jurisdiction of suits that private persons who live in another state or in a foreign country bring against a State. The Supreme Court has interpreted the Amendment as also depriving federal courts of jurisdiction of suits that private persons bring against their own States. In *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 54, 116 S.Ct. 1114, 1122 (1996), the Court explained that it has interpreted the Amendment "not so much for what it says," but for the two-part presupposition that it confirms: "first, that each State is a sovereign entity in our federal system; and second, that it is inherent in the nature of sovereignty not to be amenable to the suit of an

individual without its consent." (Citations omitted.) A suit against a State officer in his or her official capacity is considered a suit against the State for Eleventh Amendment immunity purposes. *Kentucky v. Graham*, 473 U.S. 159, 165-66 (1985).

There are three exceptions to the rule that a private person cannot sue his or her State in federal court. A person may do so when (1) Congress has abrogated a State's sovereign immunity; (2) a State has waived its sovereign immunity by consenting to suit; or (3) the person is seeking to enjoin a state officer from committing a future violation of federal law. Exception (1) does not apply here because Congress has not enacted any statute purporting to abrogate Arizona's sovereign immunity regarding state tax issues. Similarly, exception (2) does not apply because Arizona has not consented in any way to this lawsuit. *See Welch v. Texas Dep't of Highways and Pub. Transp.*, 483 U.S. 468, 473-74 (1987) (stating that because a State's "constitutional interest in immunity encompasses not merely *whether* it may be sued, but *where* it may be sued," a State does not waive its sovereign immunity in federal court by waiving it in its own courts). Therefore, exception (3) is the only possible basis for federal court jurisdiction, yet it too does not apply to this challenge to Arizona tax law.

In *Ex parte Young*, 209 U.S. 123 (1908), the Supreme Court held that the Eleventh Amendment did not deprive the federal courts of jurisdiction of suits by private persons that sought to enjoin state officers from committing future violations of federal law. It did so based on the fiction that such suits, unlike official capacity suits generally, were not suits against the States because the States could not authorize their officers to violate federal law and state

officers who did so were therefore stripped of their capacity as state representatives. The *Ex parte Young* exception is a narrow one, however, as the Supreme Court recently made clear in *Seminole Tribe* and *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 117 S.Ct. 2028 (1997).

Seminole Tribe involved an attempt by an Indian tribe to force the State of Florida to comply with provisions of the Indian Gaming Regulatory Act. The suit named the State and the Governor and sought to invoke the *Ex parte Young* rule allowing for federal jurisdiction over claims for prospective injunctive relief against state officials. The Court held that *Ex parte Young* should not be invoked where Congress "has prescribed a detailed remedial scheme for the enforcement against a State of a statutorily created right. . . ." 116 S.Ct at 1132. The Tenth Circuit has interpreted the decision as imposing

> [A]n obligation for the federal courts to examine Congress' stated intent with respect to the scope of statutory remedies that may be available in any case where an *Ex parte Young* issue is raised. The crucial inquiry is whether Congress has expressed an intent, through some kind of statutory scheme, to limit or prevent potential remedies in a private cause of action even though broader remedies might otherwise be available against the state through the *Ex parte Young* rule. If so, then under *Seminole Tribe*, the federal courts are not ordinarily free to go beyond that congressional intent.

ANR Pipeline Co. v. Lafaver, 150 F.3d 1178, 1189 (10th Cir. 1998).

Coeur d'Alene further limited the exception. The case involved a federal suit by an Indian tribe seeking a

declaratory judgment establishing its right to quiet enjoyment over the submerged lands of a lake, as well as prospective relief against numerous State officials. The Court was badly divided, but in a portion of the opinion that was joined by five justices, the Court stated:

> An allegation of an on-going violation of federal law where the requested relief is prospective is ordinarily sufficient to invoke the *Young* fiction. However, this case is unusual in that the Tribe's suit is the functional equivalent of a quiet title action which implicates special sovereignty interests. . . . We must examine the effect of the Tribe's suit and its impact on these special sovereignty interests in order to determine whether the *Ex parte Young* fiction is applicable.
>
> * * *
>
> It is apparent, then, that if the Tribe were to prevail, Idaho's sovereign interest in its lands and waters would be affected in a degree fully as intrusive as almost any conceivable retroactive levy upon funds in its Treasury. Under these particular and special circumstances, we find the *Young* exception inapplicable. The dignity and status of its statehood allows Idaho to rely on its Eleventh Amendment immunity and to insist upon responding to these claims in its own courts, which are open to hear and determine the case.

521 U.S. at 281, 287-88, 117 S.Ct. at 2040, 2043.

Under both *Seminole Tribe* and *Coeur d'Alene* the Eleventh Amendment bars federal courts from hearing a challenge to a state tax law. The Tax Injunction Act is exactly the kind of remedial measure enacted by Congress that *Seminole Tribe* held deprives federal courts of

jurisdiction. *See ANR Pipeline*, 150 F.3d at 1191 ("[W]e conclude that the *Ex parte Young* doctrine may not be invoked for the pipelines' prospective claims that seek relief that is precluded by the Tax Injunction Act."). Congress has made it clear in the Tax Injunction Act that disputes regarding state tax laws should be heard in State courts, even when those disputes involve issues of federal law.

Coeur d'Alene also compels the conclusion that the Eleventh Amendment bars this suit because federal jurisdiction over a State tax dispute plainly "implicates special sovereignty interests" of the State. *See National Private Truck Council*, 515 U.S. at 586, 115 S.Ct. at 2354 ("We have long recognized that principles of federalism and comity generally counsel that courts should adopt a hands-off approach with respect to state tax administration."); *ANR Pipeline*, 150 F.3d at 1193 ("Congress has made it clear in no uncertain terms that a state has a special and fundamental interest in its tax collection system.").

In *ANR Pipeline* the Tenth Circuit recently held that the Eleventh Amendment bars a state tax challenge, finding that both *Seminole Tribe* and *Coeur d'Alene* bar the suit. The court concluded:

> The Supreme Court has held that in cases implicating the core powers of a state qua state, the Eleventh Amendment directs a litigant to the state's courts. Of course, a litigant always may seek review of the state court decisions by the U.S. Supreme Court through a petition for certiorari. *See* 28 U.S.C. § 1257. As lower federal courts, however, this court and the federal district court in Kansas may not entertain the pipeline's suit ultimately seeking federal declaratory relief

against the tax policy of the state of Kansas. The relief sought by the pipelines impermissibly intrudes upon Kansas' "dignity and status" as a sovereign government.

150 F.3d at 1194.

Plaintiffs' suit similarly seeks relief against the tax policy of the State of Arizona. They may seek relief in the courts of Arizona and may ultimately seek review by the United States Supreme Court. They cannot, however, seek relief in the federal courts because the Eleventh Amendment immunizes the State of Arizona and its tax officials from suit.

CONCLUSION

The Tax Injunction Act and the Eleventh Amendment deprive this Court of subject matter jurisdiction over this action. Therefore, the Complaint should be dismissed.

RESPECTFULLY SUBMITTED this 9th day of March, 2000.

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Copy of the foregoing mailed this
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UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

Kathleen M. Winn, an Arizona taxpayer; Diane Wolfthal, an Arizona taxpayer; Maurice Wolfthal, an Arizona taxpayer; and Lynn Hoffman, an Arizona taxpayer, Plaintiffs, v. Mark W. Killian, in his official capacity as Director of the Arizona Department of Revenue, Defendant.	No. CIV 00 02 87 PHX EHC **PLAINTIFF'S RESPONSE TO DEFENDANT'S MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION** (Oral Argument Requested)

Plaintiffs hereby respond to Defendant Mark W. Killian's Motion to Dismiss this litigation for lack of subject matter jurisdiction. Defendant claims that the Tax Injunction Act and the Eleventh Amendment prevent this

Court from determining the constitutionality of a state tax credit system that funnels millions of dollars that would otherwise go to the state general fund directly into private religious schools. This argument is without merit, as set forth in the attached Memorandum of Points and Authorities, and Defendant's Motion should therefore be denied.

DATED this 11th day of April, 2000.

SACKS TIERNEY, P.A.

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Defendant argues that the Federal Tax Injunction Act of 1937, 28 U.S.C. §1341, and the Eleventh Amendment to the United States Constitution each deprive this Court of subject matter jurisdiction in this case. Both of these contentions are plainly incorrect. The Tax Injunction Act is inapplicable because Plaintiffs do not seek to interfere with the collection of state taxes. The Eleventh Amendment is inapplicable because Plaintiffs seek prospective relief against a state official under the well-established doctrine of *Ex parte Young*, 209 U.S. 123 (1908). Defendant's motion to dismiss should therefore be denied in its entirety.

II. THE TAX INJUNCTION ACT IS INAPPLICABLE TO THIS CASE BECAUSE PLAINTIFFS DO NOT SEEK TO "ENJOIN, SUSPEND OR RESTRAIN THE ASSESSMENT, LEVY OR COLLECTION OF ANY [STATE] TAX."

The Tax Injunction Act, 28 U.S.C. §1341 provides that:

> The district courts *shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under state law* where a plain, speedy and efficient remedy may be had in the courts of such state.

(Emphasis added.) The plain language of the Tax Injunction Act makes it clearly inapplicable to this case. Plaintiffs do not seek to invalidate any state tax or to interfere in any way with the State's ability to "assess, levy or collect" taxes. Quite to the contrary, Plaintiffs seek to invalidate a state statute providing for a state income-tax *credit*, on the ground that the credit violates the Establishment of Religion Clause of the First Amendment. If Plaintiffs are successful in this challenge, and the credit is held to be unconstitutional, the result will be to *increase*, rather than to reduce, the amount of income tax the State will be entitled to collect.[1] There will be no restraint whatsoever on the State's ability to collect taxes.

[1] According to a recent article in The Arizona Republic, at least $13,315,712 was diverted to private schools as a result of the tax credit in question, at least $11,058,628 of that amount to private religious schools. *See* Karina Bland, "School Tax Credits Wide Open to Abuse," The Arizona Republic, April 9, 2000, at A1, A22. If Plaintiffs are successful, the state will save millions of dollars a year.

The United States Supreme Court has held on numerous occasions that the Tax Injunction Act has no application to litigation that would increase the taxes due to the State. *See, e.g., Jefferson County, Alabama v. Acker,* 119 S. Ct. 2069, 2076 (1999), in which the Court recently held that the Tax Injunction Act "is to be enforced according to its terms. . . . By its terms, the Act bars . . . suits to stop ('enjoin, suspend or restrain') the collection of taxes. . . . "[A] suit to collect a tax is surely not brought to restrain state action, and therefore does not fit the Act's description of suits barred from federal district court adjudication. . . . The Tax Injunction Act was . . . shaped by state and federal provisions barring anticipatory actions by taxpayers to stop the tax collector from initiating collection proceedings." *See also California v. Grace Brethren Church,* 457 U.S. 393, 408 (1982) ("It is plain from [the language of the statute] that the Tax Injunction Act prohibits a federal district court, in most circumstances, from issuing an injunction *enjoining the collection of state taxes.*") (Emphasis added.*); Rosewell v. LaSalle National Bank,* 450 U.S. 503, 522 (The Act is intended to prevent interference with tax collection.); 17 CHARLES A. WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 4237 (1988) (The Tax Injunction Act "was first and foremost a vehicle to limit drastically federal district court jurisdiction to interfere with so important a local concern as *the collection of taxes.*") (Emphasis added.)

This "plain meaning" interpretation of the Tax Injunction Act has been explicitly adopted in the Ninth Circuit. *See, e.g., Jerron West, Inc. v. California State Board of Equalization,* 129 F.3d 1334, 1338 (9th Cir. 1997) ("[T]he Act prohibits relief where it would result in *a restraint on tax assessment. . . .*") (Emphasis added.). In *Hoohuli v.*

Ariyoshi, 741 F.2d 1169, 1177 (9th Cir. 1984), the Ninth Circuit held that the Act had no application to a case in which "the requested relief would not 'enjoin, suspend or restrain the assessment, levy or collection' of a state tax." The Court observed that the Act arose from congressional concerns that "[d]uring the pendency of the federal suit the *collection of revenue* under the challenged law might be obstructed, with consequent *damage to the State's budget. . . .*" (Emphasis added.) It bears repeating that, in seeking to invalidate the State tax credit in the present case on Establishment Clause grounds, Plaintiffs do not wish to obstruct the State's collection of revenue, to reduce State revenues, or to restrain tax collection in any way. Plaintiffs' claim is that the State is unconstitutionally *declining* to collect income tax revenue, by permitting that revenue to be diverted to religious purposes rather than paid to the State.

A recent federal district court decision in Rhode Island, in a case analytically identical to the present action, holds the Tax Injunction Act plainly inapplicable. Plaintiffs in that case challenged the exemption of religious organizations from state unemployment taxes as a violation of the Establishment Clause. There, as here, the State's Attorney General moved to dismiss for lack of jurisdiction on the basis of the Tax Injunction Act. The Court correctly found the contention to be entirely without merit. *Rojas v. Fitch,* 928 F. Supp. 155 (D.R.I. 1996). The Court's analysis was as follows:

> It is clear from the very text of the [Tax Injunction Act] that it is not applicable in this instance. The present action is not an action to "enjoin, suspend or restrain" the collection of taxes. In fact, it is quite the opposite. This is, in essence,

> an action to compel the State of Rhode Island to collect taxes. *See Moton v. Lambert,* 508 F. Supp. 367, 368 (N.D. Miss. 1981) (Plaintiff's action to invalidate tax exemption for racially segregated schools was not [barred] because it was a "demand that taxes be collected and not enjoined.")
>
> . . . [B]ecause this action does not seek to enjoin or suspend the assessment and collection of taxes, the Tax Injunction Act does not apply.

Id. at 159-60.

In this case, Defendant seeks to apply the Tax Injunction Act to preclude federal district courts not only from interfering with State tax collection, but from considering any issue involving "the administration of state tax systems." Defendant's Memorandum in support of Motion to Dismiss, pp. 4-5. This reading of the statute is completely unsupported by either the language of § 1341 or by any relevant authority. Indeed, Plaintiffs have been unable to find any federal case, and Defendant cites none, in which the Tax Injunction Act has been held to preclude a federal suit merely because a state tax system was involved, when the suit did not seek actually to interfere with State tax collection. To the contrary, as the Supreme Court, the federal Courts of Appeal,[2] other federal courts, and respected commentators have consistently agreed, the

[2] There is, so far as we can tell, no disagreement among the Circuits on this issue. *See, e.g., Wells v. Malloy,* 510 F.2d 74 (2d Cir. 1975) (Friendly, J.); *Hargrave v. McKinney,* 413 F.2d 320 (5th Cir. 1969); *Dunn v. Casey,* 808 F.2d 555, 558 (7th Cir. 1986) ("The text of § 1341 does not suggest that federal courts should tread lightly in issuing orders that might allow local governments to raise *additional* taxes.") (Emphasis added.)

purpose of the Tax Injunction Act was and still is to shield States from federal suits that would interfere with the collection of tax revenue, not to preclude federal district court jurisdiction whenever State tax legislation is challenged as unconstitutional.

If any further evidence were required of the incorrectness of the defendant's interpretation of the Tax Injunction Act, it is provided by the two leading Supreme Court cases regarding the validity, under the Establishment Clause, of State tax credits and deductions for tuition of children attending religious schools. In *Committee for Public Education v. Nyquist,* 413 U.S. 756, 789-98 (1973), the Court held State income-tax credits for religious school tuition payments to be unconstitutional. In *Mueller v. Allen,* 463 U.S. 380 (1983), the Court upheld State income-tax deductions for religious school expenses against an Establishment Clause attack. Both of those cases originated as federal district court challenges to the constitutionality of State tax laws and policy. In addition, both were initiated well after passage of the Tax Injunction Act. If Defendant's interpretation of the Act were correct, the district courts in both cases would have lacked subject matter jurisdiction and the Supreme Court would, consequently, have lacked jurisdiction to address the issues on the merits. In addition, because lack of subject matter jurisdiction is not a waivable issue, the Supreme Court would have been required to dismiss the cases even if the parties themselves had not raised the Tax Injunction Act issue. In both cases, however, the Supreme Court reached and decided the merits of the constitutional challenges. Furthermore, in neither Supreme Court opinion is there any mention whatsoever of the Tax Injunction Act.

Clearly, the Court in *Nyquist* and *Mueller* did not invoke the Tax Injunction Act because it was, by its terms and as consistently construed, inapplicable. The Establishment Clause challenges to State income tax credits and deductions in those cases, like the challenge in the present case, did not seek to prevent the States from collecting tax revenue. The challenges asserted the constitutional invalidity, not of State *taxes*, but of *exemptions or exclusions* from State taxes. The Tax Injunction Act simply has no application to such matters.

III. THE PRESENT SUIT IS NOT BARRED BY THE ELEVENTH AMENDMENT.

Plaintiffs in this case have brought suit against the Director of the Arizona Department of Revenue, in his official capacity, for prospective relief in order to prevent a continuing violation of the United States Constitution. It has been clear, since the Supreme Court's decision *in Ex parte Young*, 209 U.S. 123 (1908), that such a suit for prospective relief against a state official is not barred by the Eleventh Amendment. *See, e.g.,* I TRIBE, AMERICAN CONSTITUTIONAL LAW 555-56 (3d ed.): "[T]he Eleventh Amendment . . . does not ordinarily prevent federal courts, even in the absence of express congressional authorization, from requiring states, through their officers, to comply with prospective federal injunctions." *See also Will v. Michigan Dept. of State Police*, 491 U.S. 58, 71 n. 10 (1989) ("Official-capacity actions for prospective relief are not treated as actions against the State."); *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89 (1984) ("A suit challenging the constitutionality of a state official's action is not one against the State. This was the holding in *Ex parte Young*. . . . ").

The doctrine of *Ex parte Young* "truly embodies a bedrock principle of American law." TRIBE, p. 564. That bedrock principle continues to govern the application of the Eleventh Amendment, even after the Supreme Court's recent decisions expanding the scope of the sovereign immunity doctrine. *See, e.g., Currie, "Ex parte Young* after *Seminole Tribe*," 72 N.Y.U. L. Rev. 547 (1997) ("My message is one of calm placidity . . . *Ex parte Young* is alive and well and living in the Supreme Court."); Monaghan, Comment, "The Sovereign Immunity Exception," 110 Harv. L. Rev. 102, 103 (1996) ("[T]he rule of *Ex parte Young* remains in full force. In suits for prospective relief, states are still accountable in federal court–through their officers – for the violation of federal law.").

Defendant nevertheless argues, contrary to this well-established authority, that the present suit is barred by the Eleventh Amendment. Defendant's convoluted Eleventh Amendment argument appears to be based primarily on his incorrect contention, addressed above, that the present suit is barred by the Tax Injunction Act. Thus, after observing that the Supreme Court, in *Seminole Tribe v. Florida*, 517 U.S. 44 (1996), has recently held that the *Ex parte Young* exception to the Eleventh Amendment does not apply when Congress "has prescribed a detailed remedial scheme for the enforcement against a State of a statutorily created right," Defendant argues that "[t]he Tax Injunction Act is exactly [that] kind of remedial measure. . . ." Defendant's Memorandum, p. 8. Defendant then invokes the Tenth Circuit's decision in *ANR Pipeline Co. v Lafaver,* 150 F.3d 1178, 1191, that "the *Ex parte Young* doctrine may not be invoked for . . . claims that seek relief that is precluded by the Tax Injunction Act."

As discussed in Part II of this Memorandum, the Tax Injunction Act plainly does not preclude Plaintiffs' claim that Arizona's tuition tax credit scheme violates the Establishment Clause. Thus, even if defendant and the Tenth Circuit are correct that the *Ex parte Young* holding does not apply to suits for prospective relief that are barred by the Tax Injunction Act, that principle is completely irrelevant here.[3]

Defendant also suggests that the Supreme Court's 1997 decision in *Idaho v. Coeur d'Alene Tribe,* 521 U.S. 261, "compels the conclusion that the Eleventh Amendment bars this suit because federal jurisdiction over a State tax dispute plainly 'implicates special sovereignty interests' of the State." Defendant's Memorandum, p. 8. This suggestion is also without substance. In *Coeur d'Alene*, the Supreme Court held that the Eleventh Amendment barred an Indian tribe's suit for prospective relief against State officials, despite *Ex parte Young*, because the suit was "the functional equivalent of a quiet title action." As such, it was "fully as intrusive [upon the State] as almost any conceivable retroactive levy upon funds in its Treasury." 521 U.S. at 281, 287-88. The same cannot possibly be said about the Establishment Clause claim in this case. The tribe's action against the State in *Coeur d'Alene* was "functionally equivalent" to a retrospective monetary damages claim against a State because, if

[3] It is, in fact, doubtful whether the holding of *ANR Pipeline* is correct. The Tax Injunction Act, when applicable, hardly seems to be a congressionally enacted "detailed remedial scheme for the enforcement against a State of a statutorily created right." Since the Act is inapplicable here, however, the correctness of *ANR Pipeline* is not implicated in this case.

successful, it would have deprived the State of property to which the State claimed ownership. In utter contrast, Plaintiffs' claim in this case, if successful, would deprive the State of neither money nor property. It would, instead, result in a substantial *increase* in State income tax revenues.

Defendant seems to advance the view that, as a result of *Coeur d'Alene*, all aspects of State "tax policy" are somehow immune from constitutional attack in federal district court. Defendant's Memorandum, p. 9. Such a contention, if successful, would require the overruling of at least two Supreme Court decisions (*Nyquist* and *Mueller*) in which State tax policies were subjected to constitutional attack in federal court. Defendant's contention would, in addition, broadly exclude from federal district jurisdiction even the most egregious Establishment Clause violations. Under Defendant's proposed principle, for example, this Court would have no subject matter jurisdiction over a taxpayer suit challenging the constitutionality of an Arizona statute exempting all members of a particular religious denomination – all Methodists, for example, or all Orthodox Jews – from paying State income taxes or any State taxes whatsoever. That plainly is not the law. As Justice O'Connor, joined by Justices Scalia and Thomas, wrote in concurrence to the *Coeur d'Alene* opinion, the Eleventh Amendment, under *Ex parte Young*, continues to call for "a straightforward inquiry into whether a complaint [against a state official] alleges an ongoing violation of federal law and seeks relief properly characterized as prospective . . . ." 521 U.S. at 295. There is no "tax policy" exception to this rule.

IV. CONCLUSION

For the reasons set forth above, Defendant's Motion to Dismiss for lack of subject-matter jurisdiction is without merit and should be denied in its entirety.

DATED this 11th day of April, 2000.

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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

KATHLEEN M. WINN, an Arizona taxpayer; DIANE and MAURICE WOLFTHAL, Arizona taxpayers; and LYNN HOFFMAN, an Arizona taxpayer, Plaintiffs, vs. MARK W. KILLIAN, in his official capacity as Director of the Arizona Department of Revenue, Defendant.	No. CIV 00-0287-PHX-EHC DEFENDANT'S REPLY TO RESPONSE TO MOTION TO DISMISS

Defendant Mark W. Killian, Director of the Arizona Department of Revenue ("Department"), replies as follows to Plaintiffs' Response to Defendant's Motion to Dismiss.

I. THE TAX INJUNCTION ACT AND THE PRINCIPLES OF COMITY UNDERLYING IT MUST BE BROADLY CONSTRUED.

Plaintiffs argue that their suit does not interfere with the State's ability to assess taxes because if they are successful the State will actually collect more money. This argument is unsupported by the language of the Act, the Supreme Court's interpretations of the Act, the principles of comity, and the rulings of the circuit courts that have addressed the issue.

First, Plaintiffs take an unduly narrow view of the language of the Act by arguing that it only applies to federal court rulings that would decrease State tax collections. The Act provides that the district courts shall not "enjoin, suspend or restrain the assessment, levy or collection of any tax under state law." Congress plainly intended to broadly restrict federal court jurisdiction over state tax disputes. Plaintiffs apparently confuse an "assessment" of taxes with a "deficiency assessment" issued when a taxpayer has paid too little. "Assessment," however, has a broader meaning in the United States Code. Assessment is the act of determining tax liability, not sending a bill for underpayment. 26 U.S.C. § 6201(a)(1) (Secretary shall assess all taxes shown on tax returns).[1] Thus, an injunction that orders the Department

[1] *See also Arashiro v. U.S.*, 94-2 USTC ¶ 50,419 (D.Haw. 1994) (United States properly assessed taxes shown on return because "when a tax return showing a tax liability and enclosing a payment is filed, no notice of deficiency is required); *IBEW Local Union No. 640 v. Forman*, 95-2 USTC ¶ 50,601, p. 99,000 (D.Ariz. 1995) (Rosenblatt, J.) ("the IRS was not required to issue a notice of deficiency . . . because the IRS is authorized by 26 U.S.C. § 6201(a)(1) to assess tax liabilities based on

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to disallow tax credits actually enjoins the Department from "assessing" the tax due under state law and is prohibited by the Tax Injunction Act.

Second, the Supreme Court has consistently rejected Plaintiffs' narrow interpretation of the Tax Injunction Act. For example, the Act does not prohibit declaratory judgments, but the Court has held that such relief is barred. *California v. Grace Brethren Church*, 457 U.S. 393 (1982). As the Court explained:

> Because the declaratory judgment "procedure may in every practical sense operate to suspend collection of the state taxes until the litigation is ended," the very language of the Act suggests that a federal court is prohibited from issuing declaratory relief in state tax cases. Additionally, because there is little practical difference between injunctive and declaratory relief, we would be hard pressed to conclude that Congress intended to prohibit taxpayers from seeking one form of anticipatory relief against state tax officials in federal court, while permitting them to seek another, thereby defeating the principal purpose of the Tax Injunction Act: "to limit drastically federal district court jurisdiction to interfere with so important a local concern as the collection of taxes."

Id. at 408-09 (footnote and citations omitted). Plaintiffs' narrow interpretation of the Tax Injunction Act is simply not the law.

liabilities reported in the joint returns . . . without resort to the deficiency assessment procedure").

Third, even if the language of the Act does not apply to this particular case, longstanding principles of comity require federal courts to leave disputes about state taxes to state courts. *National Private Truck Council*, 515 U.S. 589, 590 (1995) ("[T]he Tax Injunction Act may be best understood as but a partial codification of the federal reluctance to interfere with state taxation."); *Fair Assessment in Real Estate Assn., Inc. v. McNary*, 454 U.S. 100, 110 (1981) ("[T]he principle of comity which predated the Act was not restricted by its passage."). In *Fair Assessment*, the Supreme Court went on to find that "the very maintenance of the suit itself would intrude on the enforcement of the state scheme." *Id.* at 114. The specific relief requested is not controlling.

Fourth, the circuit court decisions Plaintiffs rely upon are not on point, and the circuits that have addressed this issue have held that the Tax Injunction Act applies even when the requested relief would increase state tax collections. *Hoochuli v. Ariyoshi*, 741 F.2d 1169 (9th Cir. 1984), cited by Plaintiffs in their Response at 4, found the Tax Injunction Act did not apply because the suit was a challenge to how the State of Hawaii spent money, not a challenge to a state tax. *Id.* at 1177 ("[T]he requested relief is directed at a *spending* program of the State of Hawaii. We know of no case which has applied the Act to limit federal court jurisdiction to enjoin state revenue spending." (emphasis in original)). Similarly, *Wells v. Malloy*, 510 F.2d 74 (2nd Cir. 1975) was a challenge to Vermont's statute that revoked a person's right to operate a motor vehicle if the person was in default of an obligation of pay the State tax on motor vehicle purchase and use. The action was not a challenge to the tax itself.

Hargrave v. McKinney, 413 F.2d 320 (5th Cir. 1969) applied only the literal language of the Act, contrary to the requirements of more recent Supreme Court decisions. In any event, the case was actually a challenge to limits on state spending that would be triggered if a county imposed taxes at too high a level. The validity of the tax itself was not at issue. Moreover, the appeal was expressly limited to the issue of whether the case should properly be heard by a single district judge or by a three-judge panel. As such, the court of appeals specifically stated that its "holding here in no way intimates an opinion upon the question of whether the federal courts, in the exercise of their discretion, should take jurisdiction of this claim." *Id.* at 327.

The language from *Dunn v. Casey*, 808 F.2d 555 (7th Cir. 1986), quoted by Plaintiffs in their Response at 5, n.2, may be disregarded as dicta. As the court notes, the "district judge was not requested in this case to interfere with the collection of a tax; he was asked to interfere with the conduct of litigation." *Id.* at 557. Here, however, this Court is being asked to directly decide how Arizona taxes should be calculated and assessed.[2]

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[2] *Rojas v. Fitch*, 928 F.Supp. 155 (D.R.I. 1996), cited by Plaintiffs at page 4 of their Response, appears to be on point, but it should not be relied upon because the Tax Injunction Act issue was not addressed on appeal. Indeed, the First Circuit expressly declined to address the issue and affirmed on the merits in order to avoid, in its words, a jurisdictional quandry. *Rojas v. Fitch*, 127 F.3d 184, 187 (1st Cir. 1997). In any event, as discussed below, the First Circuit has rejected the argument that federal courts may hear tax disputes that result in orders to increase taxes. *United States Brewers Association, Inc. v. Perez*, 592 F.2d 1212 (1st Cir. 1979) (interpreting a federal statute

(Continued on following page)

The circuit courts that have addressed this issue have held that the Tax Injunction Act bars federal court jurisdiction even when the result of deciding a state tax dispute would be to increase taxes. In *In re Gillis*, 83 F.2d 1001 (6th Cir. 1988), the Sixth Circuit found that the Tax Injunction Act applied to an action where the plaintiffs sought an injunction ordering tax officials to assess all real and personal property owned by coal, oil, and gas interests at full fair cash value. The plaintiffs alleged that tax officials had violated their right to equal protection by assessing other taxpayers at less than full fair cash value, while plaintiffs were taxed at full value. In other words, the plaintiffs sought to have the court order the state officials to tax other taxpayers more. The plaintiffs argued that the Tax Injunction Act did not apply because their requested relief would enhance, not restrain, the collection of taxes. *Id.* at 1007-08. The circuit court rejected this narrow construction. The court instead focused on the underlying policy that federal courts should not decide state tax issues.

> [W]hile ultimately respondents claim they seek to force the collection of additional taxes, the interference by the federal courts into the state tax system is the same in degree and kind as a suit seeking to enjoin a state tax; and the expense to the state in defending the action is identical. . . . [I]t is noteworthy that the district court would be forced to issue a declaratory judgment finding that virtually all property owners in the state of Kentucky had been

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applicable to Puerto Rico that contains essentially the same language as the Tax Injunction Act).

> deprived of their right to equal protection. . . . While respondents insist that such a ruling would work no damage to the fiscal system of the state – since the remedy would be reassessment of those who have been underassessed, rather than refunds to respondents – we cannot logically conclude that no harm would result from a ruling that property assessments have been unconstitutionally administered for years.

Id. at 1008. The same can be said in this case. Striking down an Arizona tax credit available to hundreds of thousands of Arizona taxpayers, and leaving their tax liability uncertain until the case is finally decided, would also have serious negative consequences on the administration of the Arizona income tax.

Similarly, in *United States Brewers Association, Inc. v. Perez*, 592 F.2d 1212 (1st Cir. 1979), the First Circuit found that a federal anti-tax injunction statute applicable to Puerto Rico, which contains essentially the same language as the Tax Injunction Act, applies to a case where the relief sought was an order that some taxpayers be taxed more. The court concluded: "[A]n order of a federal court requiring Commonwealth officials to collect taxes which its legislature has not seen fit to impose on its citizens strikes us as a particularly inappropriate involvement in a state's management of its fiscal operations." *Id.* at 1215.

Finally, neither *Committee for Public Education v. Nyquist*, 413 U.S. 756 (1973), nor *Mueller v. Allen*, 463 U.S. 380 (1983), support Plaintiffs' position. The Tax Injunction Act was not at issue in either case. As Judge Friendly stated in one of the cases Plaintiffs cite in their Response: "[P]laintiff derives no benefit from [a Supreme

Court case] invalidating Virginia's poll tax, since the defendants in that case had not raised the issue of the applicability of the state tax injunction act, and neither the majority nor the minority opinion advert to it." *Wells v. Malloy*, 510 F.2d 74, 76-77 (2nd Cir. 1975). In any event, if the Tax Injunction Act had been raised in *Nyquist* and *Mueller*, the United States Supreme Court could still have decided the issues, through appeals from the state courts. The Tax Injunction Act does not leave claimants without a remedy; it merely requires that claims be heard in state courts.

In summary, Plaintiffs' argument is not supported by either the language or the spirit of the Tax Injunction Act. The Act, and the principles of comity that underlie it, require that this action be dismissed. Plaintiffs are asking this Court to consider the constitutionality of a portion of Arizona's income tax and order the State to assess taxes in a particular manner. This Court should refuse to accept jurisdiction.

II. THE ELEVENTH AMENDMENT BARS THIS ACTION.

Plaintiffs express disbelief that the Eleventh Amendment could bar them from having their case heard in federal court. Nevertheless, the purpose and policy of the Eleventh Amendment is to do just that. There is no question that Plaintiffs cannot sue the State of Arizona or the Department of Revenue. Their attempt to avoid Eleventh Amendment immunity by suing the Director of the Department fails because this action is the functional equivalent of a suit against the State and it implicates

special sovereignty interests of the State given special protection by Congress and the Supreme Court.[3]

The Ninth Circuit has stated that "[t]he four circumstances in which . . . declaratory and injunctive relief actions against individual state officials have been allowed to proceed in federal court are when (1) state officials are plainly acting outside their statutory authority, (2) no state forum exists to vindicate federal interests, (3) it is necessary to permit the federal courts to vindicate federal rights, and (4) a plaintiff seeks prospective relief to end a state officer's ongoing violation of federal law." *Yakama Indian Nation v. State of Washington Dep't of Revenue*, 176 F.3d 1241 (9th Cir. 1999) (citations and internal quotation marks omitted). It is plain that reasons one through three do not apply here. The Department is recognizing tax credits clearly allowed by State statute and any federal rights or interests may be pursued in the Arizona courts, as shown by the Arizona Supreme Court's decision in *Kotterman*.

Plaintiffs rely on reason four, but as the Supreme Court held in both *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996) and *Idaho v. Coeur d'Alene Tribe of*

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[3] Federal law consistently recognizes that the remedies available in tax cases are narrower than those available in non-tax cases. *U.S. v. Brockamp*, 519 U.S. 347 (1997) (courts will not apply equitable principles to tax cases even when they might apply to other types of cases); *National Private Truck Council*, 515 U.S. at 588 (Section 1983 actions challenging taxes may not be brought in state courts, although state courts must entertain non-tax cases under that statute); *Fair Assessment*, 454 U.S. at 104 (barring federal courts from hearing section 1983 challenges to state taxes, although non-tax cases are allowed).

Idaho, 521 U.S. 261 (1997), a plaintiff cannot overcome Eleventh Amendment immunity by merely seeking injunctive relief against state officers. As the Court stated in *Coeur d'Alene*:

> The real interests served by the Eleventh Amendment are not to be sacrificed to elementary mechanics of captions and pleading. Application of the *Young* exception must reflect a proper understanding of its role in our federal system and respect for state courts instead of a reflexive reliance on an obvious fiction.

521 U.S. at 270.[4]

Congress and the Supreme Court have repeatedly expressed a policy that state tax disputes be decided in state courts. There might be good reason to apply the *Ex parte Young* exception to the Eleventh Amendment even in tax cases if state tax officials were ignoring well-established federal law, or state courts were not open to taxpayers. As the *Kotterman* case shows, however, neither of those factors exists here. Therefore, Plaintiffs' claims are barred because they implicate Arizona's special sovereignty interests in its own tax sysyem. *See ANR Pipeline Co. v. Lafaver*, 150 F.3d 1178, 1193 (10th Cir. 1998), *cert. denied*, 119 S.Ct. 904 (1999) ("We do not doubt, therefore, that a state's interests in the integrity of its property tax system lie at the core of the state's sovereignty. Indeed, where it is possible to imagine a state government continuing to maintain its sovereignty despite

[4] The quoted language is from Section II.A of the *Coeur d'Alene* opinion, which was joined by five justices.

the lack of any ownership of land, *cf. Coeur d'Alene Tribe*, 117 S.Ct. at 2041, it is impossible to imagine a state government could continue to exist without the power to tax.").

Moreover, Plaintiffs complaint goes beyond a simple request for prospective relief. They seek an order prohibiting the Department from allowing the tax credit to be used. Complaint at 7. Does this mean that the Department will have to disallow all such credits as it examines returns in its normal audit process, even credits claimed for contributions made before any injunction is issued (for example, in 1998, 1999 or early 2000)? Must the Department examine each tax return for prior years and disallow any claimed credits? If a taxpayer has carryover credits from earlier years, must they be disallowed? These questions show that the requested relief is not, and cannot be, just prospective, but is intended to reach prior tax years and past actions of taxpayers.[5]

For the reasons stated above, and in the Motion to Dismiss, this action should be dismissed because it is barred by the Eleventh Amendment.

[5] Plaintiffs also request that the Department be ordered to inform all School Tuition Organizations that "all funds in their possession as of the date of this Court's order must be paid into the state general fund." Complaint at 7-8. While it is doubtful that the Court can determine the legal status of funds held by organizations that are not parties to this action, this request highlights the fact that Plaintiffs are actually seeking both past and future relief.

CONCLUSION

The Tax Injunction Act and the Eleventh Amendment deprive this Court of subject matter jurisdiction over this action. Therefore, the Complaint should be dismissed.

RESPECTFULLY SUBMITTED this 20th day of April, 2000.

JANET NAPOLITANO
Arizona Attorney General

PATRICK IRVINE
Assistant Attorney General

Copy of the foregoing mailed this
20th day of April, 2000, to:

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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

KATHLEEN M. WINN, an Arizona taxpayer; DIANE and MAURICE WOLFTHAL, Arizona taxpayers; and LYNN HOFFMAN, an Arizona taxpayer, Plaintiff-Appellants, vs. J. ELLIOTT HIBBS, in his official capacity as Director of the Arizona Department of Revenue, Defendant-Appellee.	No. 01-15901 DC No. CIV 00-0287 EHC Arizona (Phoenix) **Motion for Clarification**

Defendant-Appellant J. Elliott Hibbs,[1] the Director of the Department of Revenue (the "Director") moves this Court to clarify that by its Orders recalling the mandate in this matter and directing the parties to file supplemental briefs, it intended to suspend the finality of the panel's judgment pending its further determination whether to hear this matter en banc.

The panel issued its opinion and judgment on October 3, 2002. Neither party filed a petition for rehearing, and on October 25, 2002, the Court issued its mandate. On October 28, 2002, the Court recalled its mandate and, on November 13, 2002, directed the parties to file simultaneous briefs setting forth their respective positions on whether the Court should hear this case en banc.

The Court's actions are consistent with its General Orders and reflect the Court's decision to suspend the finality of the judgment until the Court either determines not to rehear the matter en banc or issues its en banc decision. Pursuant to General Order (GO) 5.4(c)(3), any judge may sua sponte call for a vote on rehearing en banc within seven days of the expiration of the time for filing a petition for panel rehearing. After receiving a timely sua sponte en banc call, the author of the panel opinion ordinarily enters an order directing parties to file simultaneous briefs within twenty-one days setting forth their respective positions on whether the Court should rehear the matter en banc. *Id.* Pursuant to GO 5.4 (d), if a sua

[1] Pursuant to Rule 43(c)(2) of the Federal Rules of Appellate Procedure, J. Elliott Hibbs, the current director of the Arizona Department of Revenue is automatically substituted for Mark W. Killian, the former director.

sponte call is made in a case in which no petition for rehearing en banc or panel rehearing has been filed, the judge who makes the call shall direct the Clerk of the Court to stay the mandate and notify the panel.

Here, the Clerk's Office issued the mandate mistakenly and corrected its error within three days by recalling it.[2] The courts of appeal have an inherent power to recall their mandates. *Hawaii Housing Auth. v. Midkiff*, 463 U.S. 1323, 1324, 104 S. Ct. 7, 8 (1983). The Court did not abuse its discretion in recalling the mandate to correct a clerical or administrative error. *See Lamb v. Farmers Ins. Co.*, 586 F.2d 96 (8th Cir. 1978); 16 C. Wright, A. Miller, & E. Cooper, *Federal Practice and Procedure*, § 3938 at 720 (2d ed. 1996) ("A miscellaneous variety of other missteps by court or parties have been corrected in circumstance that do not threaten the central values of repose. . . .").

The Court's actions, *i.e.*, recalling the mandate and ordering simultaneous briefing on whether to hear the matter en banc, indicated its intent to suspend the finality of the judgment in this case pending its determination of the sua sponte en banc call. *See Young v. Harper,* 520 U.S. 143, 147 n.1, 117 S. Ct. 1148, 1151 n.1 (1997) (recognizing that a petition for certiorari was timely filed because the court extended the time for filing the rehearing petition

[2] Appellants assume that the sua sponte en banc call was untimely. *See* Appellants' Supplemental Brief Regarding Rehearing en Banc at 1-3 n.3. However, it may have been that the call was made within the twenty-one day deadline but the Clerk's Office issued the mandate in error. Moreover, GO 5.1(b)(2) gives the en banc coordinator the authority to extend, suspend, or compress the time schedules in the En Banc Procedures Chapter for good cause.

and no mandate issued until after the petition was denied); *Missouri v. Jenkins*, 495 U.S. 33, 45, 110 S. Ct. 1651, 1660 (1990) (recognizing the Supreme Court's consistent practice "to treat petitions for rehearing timely presented to the Courts of Appeals as tolling the start of the period in which a petition for certiorari must be sought until rehearing is denied or a new judgment is entered on the rehearing"). Although neither party filed a petition for rehearing within fourteen days, the Court's internal procedures allowing for a sua sponte en banc call and ordering simultaneous briefing in effect extend the time for considering rehearing petitions and suspend the finality of the judgment. In fact, the Director's counsel understood that the Court's actions suspended the finality of the judgment and therefore did not file a petition for certiorari within ninety days of the judgment.

CONCLUSION

For the foregoing reasons, the Director respectfully requests the Court to clarify that its Orders recalling the mandate and directing the parties to file simultaneous briefs suspended the finality of the judgment.

Dated this 17th day of January, 2003.

Paula S. Bickett
Chief Counsel, Civil Appeals
Attorneys for Defendant-Appellee

Original and 4 copies of the foregoing
mailed this 17th day of January, 2003
via Federal Express to:

Office of the Clerk
United States Court of Appeals

for the Ninth Circuit
95 Seventh Street
P.O. Box 193939
San Francisco, California 94119-3939

Copy of the foregoing mailed
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Scottsdale, Arizona 85251-3900
Attorneys for Plaintiffs-Appellants

by_____

140 Resident Personal Income Tax Return 2000

Or fiscal tax year beginning _____, 2000, and ending _____, 2001. 66

Your first name and initial 1	Last name	Your social security number
If a joint return, spouse's first name and initial 1	Last name	Spouse's social security number
Present home address - number and street, rural route 2 / Apt. No.	Daytime telephone ( )	IMPORTANT! You must enter your SSN(s) above.
City, town or post office / State / ZIP code 3	Home telephone 94 ( )	For DOR use only

Filing Status

4		Married filing joint return
5		Head of household - name of qualifying child or dependent :
6		Married filing separate return. Enter spouse's social security number above and full name here. ➤
7		Single

Exemptions

8		Age 65 or over (you and/or spouse)	*Enter the number claimed. Do not put a check mark.*
9		Blind (you and/or spouse)	
10		Dependents. *From page 2, line A2 - **do not include self or spouse.***	
11		Qualifying parents and ancestors of your parents. *From page 2, line A5.*	

88

81 80

82 CHECK ONE if filing under a federal extension: 4 month federal extension 82 D ☐ 6 month federal extension 82 F ☐

12	Federal adjusted gross income (from your federal return)	12	00
13	Additions to income *(from page 2, line B12)*	13	00
14	Add lines 12 and 13	14	00
15	Elective subtraction of 2000 federal retirement contributions. *See instructions*	15	00
16	Subtractions from income *(from page 2, line C17 or line C28)*	16	00
17	Total subtractions. *Add line 15 and line 16*	17	00
18	Arizona adjusted gross income. *Subtract line 17 from line 14*	18	00
19	**Deductions. *Check box and enter amount.*** *See instructions, page 12.* 19 1 ☐ ITEMIZED 19 5 ☐ STANDARD	19	00
20	Personal exemptions. *See page 12 of the instructions*	20	00
21	Arizona taxable income. *Subtract lines 19 and 20 from line 18*	21	00
22	Compute the tax using amount on line 21 and Tax Rate Table X, Y or Optional Tax Rate Tables	22	00
23	Tax from recapture of credits from Arizona Form 301, line 30	23	00
24	Subtotal of tax. *Add lines 22 and 23*	24	00
25	Clean Elections Fund Tax Reduction. *See instructions, page 13.* 25 1 ☐ YOURSELF 25 2 ☐ SPOUSE	26	00
26	Tax reduction. *Complete worksheet on page 13 of the instructions*	27	00
27	Reduced tax. *Subtract line 26 from line 24*	28	00
28	Family income tax credit from worksheet on page 14 of instructions	29	00
29	Credits from Arizona Form 301, line 56	31	00
30	Credit type. *Enter form number of each credit claimed* 30 [3] [3] [3] [3]	32	00
31	*Subtract lines 28 and 29 from line 27. If lines 28 and 29 are more than line 27, enter zero.*	33	00
32	Clean Elections Fund Tax Credit. *From worksheet on page 16*	34	00
33	Balance of tax. *Subtract line 32 from line 31. If line 32 is more than line 31, enter zero.*	35	00
34	Arizona income tax withheld during 2000	36	00
35	Arizona estimated tax payments for 2000	37	00
36	Amount paid with 2000 Arizona extension request (Form 204)	38	00
37	Property tax credit. Attach Arizona Form 140PTC and enter amount claimed	39	00
38	Other refundable credits *check box(es) and enter amount(s)* 38 A1 ☐ 313 38 A2 ☐ 326 38 A3 ☐ 327	40	00
39	Total payments/refundable credits. *Add lines 34 through 38*	41	00
40	**TAX DUE.** *If line 33 is larger than line 39, subtract line 39 from line 33 and enter amount of tax due. Skip lines 41, 42 and 43*	42	00
41	**OVERPAYMENT.** *If line 39 is larger than line 33, subtract line 33 from line 39 and enter amount of overpayment*	43	00
42	Amount of line 41 to be applied to 2001 estimated tax		
43	Balance of overpayment. *Subtract line 42 from line 41*		

Voluntary gifts to:

Aid to Education Fund (Enter entire refund only)	44	00	Arizona Wildlife Fund	45	00
Citizens Clean Elections Fund	46	00	Child Abuse Prevention Fund	47	00
Domestic Violence Shelter Fund	48	00	Neighbors Helping Neighbors Fund	49	00
Special Olympics Fund	50	00	Political Gift	51	00

52 Check only one if making a political gift: 52 1 ☐ Democratic 52 2 ☐ Green 52 3 ☐ Libertarian 52 4 ☐ Natural Law 52 5 ☐ Reform 52 6 ☐ Republican

53	Estimated payment penalty and interest and MSA withdrawal penalty	53	00
54	Check applicable box(es). 54 1 ☐ Annualized/Other 54 2 ☐ Farmer or fisherman 54 3 ☐ Form 221 attached 54 4 ☐ MSA Penalty		
55	Total of lines 44, 45, 46, 47, 48, 49, 50, 51, and 53	55	00
56	**REFUND.** *Subtract line 55 from line 43. If less than zero, enter amount owed on line 57*	56	00
57	**AMOUNT OWED.** *Add lines 40 and 55. Include SSN on payment* Make Checks Payable To: Arizona Department of Revenue	57	00

If itemizing be sure you attach your federal Sch. A and Arizona Sch. A if required.

Attach payment here.

ESTIMATED TAX

ADOR 06-0011 (00)

PART A Dependents

Do not list yourself or spouse.

A1 List children and other dependents. If more space is needed, attach a separate sheet.

First name	Last name	Social security number	Relationship	No. of months lived in your home in 2000

A2 Enter total number of persons listed in A1 here and on the front of this form, box 10. TOTAL **A2**

A3 Enter the names of the dependents age 65 or over listed above who do not qualify as your dependent on your federal return:

A4 List qualifying parents and ancestors of your parents. If more space is needed, attach a separate sheet. You cannot list the same person here and also on line A1. For information on who is a qualifying parent or ancestor of your parents, see page 5 of the instructions.

First name	Last name	Social security number	Relationship	No. of months lived in your home in 2000

A5 Enter total number of persons listed in A4 here and on the front of this form, box 11. TOTAL **A5**

PART B Additions to income

B6	Non-Arizona municipal interest	**B6**	00
B7	Early withdrawal of Arizona Retirement System contributions not included on your federal return	**B7**	00
B8	Ordinary income portion of lump-sum distributions excluded on your federal return	**B8**	00
B9	Agricultural water conservation expenses	**B9**	00
B10	Medical savings account (MSA) distributions. *See page 6 of the instructions*	**B10**	00
B11	Other additions to income. *See instructions and attach your own schedule*	**B11**	00
B12	Total. *Add lines B6 through B11. Enter here and on the front of this form, line 13*	**B12**	00

PART C Subtractions from income

C13	Exemption: Age 65 or over. *Multiply the number in box 8, page 1, by $2,100*	**C13**	00		
C14	Exemption: Blind. *Multiply the number in box 9, page 1, by $1,500*	**C14**	00		
C15	Exemption: Dependents. *Multiply the number in box 10, page 1, by $2,300*	**C15**	00		
C16	Exemption: Qualifying parents and ancestors of your parents. *Multiply the number in box 11, page 1, by $10,000*	**C16**	00		
C17	Total exemptions. Add lines C13 through C16. ***If you have no other subtractions from income, skip lines C18 through C28 and enter the amount on line C17 onto Form 140, page 1, line 16***			**C17**	00
C18	Interest on U.S. obligations such as U.S. savings bonds and treasury bills			**C18**	00
C19	Exclusion for federal, Arizona state or local government pensions (up to $2,500 per taxpayer)			**C19**	00
C20	Arizona state lottery winnings included as income on your federal return (up to $5,000 only)			**C20**	00
C21	U.S. social security or Railroad Retirement Act benefits included as income on your federal return			**C21**	00
C22	Agricultural crops contributed to Arizona charitable organizations			**C22**	00
C23	Alternative fuel vehicles and refueling equipment			**C23**	00
C24	Certain wages of Native Americans			**C24**	00
C25	Income tax refund from other states. See instructions			**C25**	00
C26	Deposits and employer contributions into MSAs. See page 9 of the instructions			**C26**	00
C27	Other subtractions from income. See instructions and attach your own schedule			**C27**	00
C28	Total. Add lines C17 through C27. Enter here and on the front of this form, line 16			**C28**	00

PART D

D29 Last name(s) used in prior years if different from name(s) used in current year.

Attach W-2 here.

Please Sign Here

I have read this return and any attachments with it. Under penalties of perjury, I declare that to the best of my knowledge and belief, they are true, correct and complete. Declaration of preparer (other than taxpayer) is based on all information of which preparer has any knowledge.

Your signature	Date	Occupation
Spouse's signature	Date	Spouse's occupation

Paid Preparer's Information

Preparer's signature		Firm's name (preparer's if self-employed)
Preparer's TIN	Date	Preparer's address

If you are sending a payment with this return, use the green envelope, or mail to: Arizona Department of Revenue, PO Box 52016, Phoenix AZ 85072-2016.

If you are expecting a refund, or owe no tax, or owe tax but are not sending a payment, use the gold envelope, or mail to: Arizona Department of Revenue, PO Box 52138, Phoenix AZ 85072-2138.